# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 330

J. C. WADE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (R. 243-244) is reported at 344 F.2d 1016.

### JURISDICTION

The judgment of the court of appeals was entered on May 7, 1965 (R. 245). A petition for rehearing was denied on June 8, 1965 (R. 246-254). The petition for a writ of certiorari was filed on July 8, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether petitioner's conviction for mail fraud should be reversed because of improper cross-examination by government counsel.

## STATEMENT

Petitioner was found guilty by a jury in the United States District Court for the Middle District of Florida on five counts (1, 6, 8, 11 and 12) charging mail fraud in ordering merchandise for which he did not intend to make payment at various times from June to November 1960 (R. 1-2, 4-6, 7-8, 20). He was sentenced to imprisonment for concurrent terms of five years on each of these counts, the sentences to be subject to modification under 18 U.S.C. 4208(b) and (c) (R. 40-41). On appeal (R. 42-43) the conviction was affirmed (R. 245).

The government's evidence showed that petitioner would order merchandise by postal card in rather small amounts (R. 52-64, 73-74, 78, 83-84, 91, 96-97, 112, 118-119, 123-124, 128, 135). It was stipulated that, in addition to the testimony orally given by the government witnesses, 36 other firms could testify to like transactions (R. 14-16). Petitioner made no payments on the merchandise until after the indictment had been returned in April 1962. Thereafter, he made some payments to the firms named in the indictment, gave promissory notes to some others, and

paid one firm after suit (R. 65, 68-69, 74, 79, 85, 87, 92-93, 97, 113, 116, 120, 124-125, 128, 135).

Petitioner testified that when he ordered the merchandise mentioned in the indictment he did not intend to cheat the sellers (R. 176). He testified that he did not pay bills for the merchandise ordered in 1960 because business was poor in 1960 and 1961 and his charge accounts did not pay him (R. 170-171). After business improved in 1962, he made payments (R. 171). He testified, on cross-examination, he was operating a ladies' apparel store in Bushnell, Florida in 1960 and two other stores as well thereafter (R. 187). When asked if he had money in the bank, he said he didn't know how much; that he usually checked out in payment of bills as fast as money came in (R. 201). He was asked what his income was from the Bushnell shop in 1960 and 1961 and said it was a loss. He gave his receipts as $300 to $400 a month in 1960 and 1961 with a slight increase in 1962 (R. 219). The following then occurred (R. 219-220):

> Q. Mr. Wade, did you fill out an income tax return for yourself or the business that year [1960]?
>
> MR. ROBERTS (petitioner's counsel): Objected to as not being proper cross examination.
>
> THE COURT: Objection overruled.
>
> A. I did not get the question.
>
> Q. Did you file an income tax return for yourself or the business?
>
> A. No, sir.
>
> Q. Did you in 1961?
>
> A. No, sir.

Q. In 1962?

A. No, sir.

Q. You have never been prosecuted for income tax evasion?

A. No, sir.

MR. ROBERTS: I object to that and ask that you admonish the District Attorney on that question.

THE COURT: The objection is sustained and the jury is instructed to disregard that statement.

## ARGUMENT

During direct examination petitioner testified to his good faith in making purchases of merchandise and his lack of intent to cheat the sellers. He ascribed his failure to make payments in 1960 and 1961 to poor business conditions and explained the payment after the indictment as resulting from improved business. In these circumstances, questions as to whether petitioner had income during the years in question was directly relevant. It was therefore proper for the government attorney to ask preliminary questions on cross-examination as to whether petitioner had filed income tax returns for 1960, 1961 and 1962. We concede that the additional question whether petitioner had ever been prosecuted for income tax evasion should not have been asked. The court, however, sustained the objection by petitioner's counsel and, in accordance with his request, instructed the jury to disregard that statement. Counsel considered this admonition sufficient and did not view the incident as sufficiently prejudicial to warrant asking for a mis-

trial. It must be presumed that the jury followed the court's instruction to disregard the statement. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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